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No. 85-813

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,

Petitioner,

vs.

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS R. NEWMAN
233 Broadway
New York, New York 10279
(212) 349-3990
Attorney for Respondent

LOUIS G. CORSI
SIFF & NEWMAN, P.C.
Of Counsel

ROBERT H. MAGIE, III
BRYAN N. ANDERSON
DONOVAN, MCCARTHY, CRASSWELLER & MAGIE
Of Counsel

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent American Mutual Insurance Company of Boston ("American Mutual") respectfully requests that the petition for a writ of certiorari by Minnesota Timber

Producers Association, Inc. ("MTPA") be denied because petitioner is asking this Court to add to its crowded docket a contract action between private parties which presents no issues of paramount public importance and which was tried in federal court only because of diversity jurisdiction.*

Opinions Below

Nowhere in its petition has MTPA acknowledged that on American Mutual's motion for summary judgment to dismiss this action, U.S. Magistrate Patrick McNulty had issued a comprehensive Memorandum Decision and Recommendation dated September 20, 1983 recommending that this case be dismissed. Without a written decision and by Minute Order dated December 8, 1983, the District Court (Miles W. Lord, C.J.) reversed and vacated the Magistrate's recommendation. The Memorandum Decision and Recommendation of the Magistrate is reproduced as Respondent's Appendix A at pages RA-1 to RA-23; the District Court's Minute Order is reproduced as Respondent's Appendix B at pages RA-24 and RA-25. The opinion of the Eighth Circuit Court of Appeals is reproduced as Petitioner's Appendix A at pages A-1 to A-14 of the petition.

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* We note that the petition has been filed on behalf of the MTPA only, although the named intervenors have been represented by the same counsel as MTPA.

Statement of the Case

Since a comprehensive review of the factual record demonstrates that this case does not warrant plenary review by this Court, and petitioner has chosen to ignore substantial parts of the record and to over-simplify the facts in its petition, American Mutual has included the statement of the case set forth below.

1. American Mutual's National Safety Group Dividend Plan.

Although completely ignored by petitioner in its petition, approximately ten years before American Mutual proposed to insure Minnesota loggers as a safety group, American Mutual's Board of Directors had adopted its Safety Group Dividend Plan ("National Plan") under which more than 100 separate safety groups had been established. (PMX-10, B-4)* Under the National Plan, the Board of Directors could vote to establish for dividend purposes separate classifications (known as "safety groups") for policy holders engaged in the same business or profession who participate in a defined program for actively promoting accident prevention and loss control. (DX-34, B-88-90) By such groupings, American Mutual sought to direct specialized safety programs and activities to these policyholders, and to pass on to the individual employers through the opportunity for increased policy dividends, a portion of the cost savings achieved by the safety program. (*Id.*)

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* Unless otherwise noted, all references are to the record on appeal before the Eighth Circuit.

Under the Rules of the National Plan (the "National Rules"), American Mutual issued individual policies with a common expiration date to each policyholder within a particular safety group. The National Rules contained guidelines for determining the dividend (DX-34, Part C, B-91-93), but the actual dividend rate, expressed as a percentage of the premiums paid by the policyholders classified in a particular safety group, was set by American Mutual's Board of Directors by separate vote for each safety group. (*Id.*)

In determining the amount available for distribution as dividends, certain deductions, including amounts allocated to a contingent balance,* were first taken from the total premium paid by policyholders in the safety group. The remaining amount would be available for such dividends as American Mutual's Board of Directors, in its discretion, decided upon.

The amount allocated to the contingent balance was subject to limitations specified in the National Rules. If the safety group's applicable charges (expenses and losses) exceeded the premium paid by the policyholders during a policy year, monies in the contingent balance would be used to cover the amount of the deficiency. (DX-34, Part C, B-91-93) Upon termination of a safety group dividend classification by American Mutual's Board, the contingent balance, as adjusted, and subject to the determination of the Board, would be distributed to eligible policyholders. (DX-34, Part C IV, B-93)

---

* The contingent balance consisted of a portion of the total premium remaining after deduction of losses and expenses which was set aside for unanticipated losses. (B-93)

In 1978 American Mutual's Board of Directors amended the National Rules in order to minimize fluctuations in the size of dividends paid from year to year. (DX-35, B-102) If a projected dividend rate for a safety group exceeded 35% of the total premium paid, the amount in excess of 35% was deferred and placed in a dividend stabilization fund, from which it could be distributed two years later. (B-108)*

2. American Mutual's insurance of Minnesota loggers.

In 1972, American Mutual sought to establish a safety group for loggers in Minnesota. By letters dated July 12 and July 28, 1972, American Mutual's representative wrote to two MTPA executives seeking MTPA's endorsement. (PMX-10, B-3, and PMX-12, B-16) Enclosed were separate and non-identical letters and proposals which generally described the potential benefits of the National Plan for participating loggers and the advantages for MTPA in sponsoring it. (*Id.*) The proposals were included "[t]o assist you in discussing the plan with other officers and members . . . ." (PMX-10, B-7; PMX-12, B-16c) These materials made clear the individual nature of the solicitation and that individual insurance policies would be issued to each participant by American Mutual. (B-5-7, B-16c, B-16j)

In December 1972, MTPA's Board of Directors endorsed American Mutual's safety group plan. (PX-20, B-196)

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* In 1981 and 1982, American Mutual's Board of Directors further amended the National Rules. (DX-36 and 29, B-854, B-84)

After endorsement, American Mutual began to directly solicit the business of individual loggers. By July 1973, a sufficient number of loggers had purchased individual insurance policies to satisfy the requirements for establishing a separate dividend classification under the National Rules. (PX-28, B-211 and PX-42, B-247) Each individual insurance policy included a "Dividend Notice" stating that the policyholder was included in the Minnesota logger dividend classification and that:

> The named insured shall participate to the extent and upon the conditions fixed and determined by the Board of Directors after expiration of the policy in accordance with the provisions of law, in the distribution of dividends so fixed and determined for such classification.
>
> No representative of [American Mutual] is authorized to waive, or change the statement of dividend conditions applicable to this dividend classification. (DX-33, B-86)

In addition, the policies stated that

> . . . this policy embodies all agreements existing between [the policyholder] and the company or any of its agents relating to this insurance. (DX-33, Condition 17, B-83)

The Minnesota loggers safety group grew steadily, and by 1981 when MTPA withdrew its endorsement the annual premiums reached approximately $2 million. (B-709) During the time of MTPA's endorsement, American Mutual paid more than $3.3 million in dividends to policyholders in this safety group. (T-400-02) These dividends, which

MTPA conceded were "unheard of in past years" (B-338), when added to additional premium discounts received by those policyholders, averaged 45.3% of the total premium paid from inception of the safety group through 1981. (B-803)

3. MTPA's efforts to use the contingent balance to self-insure its members.

Despite this success and the expressed satisfaction of the policyholders with American Mutual and the safety group (*e.g.*, DX-18, B-64), in December 1979, because of steeply increasing state workers' compensation insurance rates and rising interest rates (T-371-72), MTPA's insurance committee, with the assistance of its present counsel, commenced a study regarding self-insurance for its members. (DX-15, B-55-59) MTPA viewed the funds in the contingent balance as a means of financing a self-insurance program or forming a captive insurance company (DX-17, B-62) and it began efforts to capture those funds.

By September 1980, MTPA's counsel asked American Mutual to provide information and documents relating to the contingent balance and the existence of any contractual relationship among American Mutual, the MTPA and/or individual policyholders relating to the contingent balance. (DX-140, B-521) After receiving a written response dated October 9, 1980, MTPA's counsel advised the insurance committee of American Mutual's position:

> 1. There is no contractual relationship with the [MTPA].
>
> 2. The group program is established by the board of directors of American Mutual and the plan rules

> as well as dividends can be changed at any time by the board.
>
> 3. The contingent balance monies are distributed after termination of the group by the company.
>
> 4. The withdrawal of the sponsorship by the association does not constitute termination of the group. (DX-17, B-62)

As also reported in the committee minutes, counsel—who had received a copy of the 1978 amended Rules of the National Plan as a part of American Mutual's October 9, 1980 response—concluded that "the contingency is totally in control of American Mutual and we cannot count on this money to help us to self-fund or form a captive." He described as "slim" MTPA's chances of prevailing in a lawsuit challenging American Mutual's position. (*Id.*)*

The MTPA insurance committee continued its consideration of self-insurance and discussed what concessions it could extract from American Mutual in exchange for continuing its endorsement. (DX-18, B-64) In addition, another insurer, Lumberman's Underwriting Alliance, expressed an interest in meeting with MTPA concerning

---

* Neither MTPA's counsel nor any insurance committee member noted any exception, in the minutes or in a contemporaneous response, to American Mutual's clear statement that it had no contractual relationship with MTPA and that distribution of the contingent balance was subject to the determination of its Board of Directors. Further, neither MTPA nor its counsel asserted that the proposals forwarded in July 1972 constituted a binding contract. At trial, however, MTPA's witnesses, including one who was present at the insurance committe meeting, testified that the proposal was "our Bible" (Petersen, T-225) and "what we lived by." (Schneider, T-130)

workers' compensation insurance for its members. (DX-20, B-70)

At a meeting on March 19, 1981, after reviewing a written comparison prepared by its insurance committee of American Mutual's safety group plan and Lumberman's program, the MTPA Board of Directors endorsed the latter program. (DX-21, B-72, B-75, B-76)

The next day, MTPA advised American Mutual it was "terminating its sponsorship of the American Mutual Worker's Comp. Safety Plan." (DX-22, B-77) American Mutual promptly notified all its Minnesota logger policyholders that MTPA's withdrawal of sponsorship "in no way affects the continuation of our highly successful program." (DX-24, B-803) At that time, MTPA did not assert, to its members or otherwise, that withdrawal of its sponsorship automatically terminated the safety group.

In June 1982, more than one year later—and almost two years after American Mutual specifically advised MTPA that withdrawal of sponsorship did *not* terminate the safety group (PX-135, B-511, DX-16, B-66)—MTPA's counsel first told American Mutual that:

> . . . it is our law firm's legal position that the withdrawal of the Timber Producers from the safety group program constituted a termination of that program. (PX-185, B-702)

Although directly contradicting his firm's new "legal position," counsel also candidly admitted that American Mutual's October 9, 1980 letter together with the amended

1978 National Rules "substantially confirms the understanding of the various members of the Association." (*Id.* B-702)

4. Proceedings below.

In the District Court, on American Mutual's motion for summary judgment, the Magistrate found the proposals American Mutual had sent to MTPA in 1972 did not constitute a binding contract under Minnesota law because the individual insurance policies subsequently issued to each participant "created a new and independent contract with each policyholder superceding the contract between [MTPA and American Mutual]." (RA-17) The Magistrate further concluded:

> The substantive right which [MTPA] seeks to have established is the right to a final dividend upon termination of the plan. This right was not created by contract between [MTPA] and [American Mutual]. This right enures solely to the policyholders by virtue of a contract of insurance between policyholders and [American Mutual] to which [MTPA] was not a party. It is a right which can be vindicated only by an action by the policyholders under precepts of the law of contracts.
>
> [MTPA] possesses no substantive right to force termination of the plan, determine its terms and provisions, or participate in distribution of dividends. (*Id.*)

The District Court, without a written decision, reversed and vacated the Magistrate's recommendation to dismiss

and scheduled the matter for trial. (RA-25) At trial, a jury awarded MTPA compensatory damages of $237,836 and punitive damages of $1 million.*

On appeal, the Court of Appeals concluded that the jury could reasonably have found that American Mutual's July 1972 proposal to the MTPA became a binding contract, and that American Mutual breached that contract by temporarily retaining some monies in the dividend stabilization fund which had been created pursuant to the modified National Rules in 1978. (A-8) Unlike the petitioner here, the court acknowledged the long history of the National Plan (A-5) and specifically observed that the "actions taken by [American Mutual which constituted the breach] were taken in the belief that they had the right to apply the modified national rules to the [Minnesota logger] safety group." (A-12) Moreover, the court also found that, pursuant to the modified National Rules, all monies previously retained in the dividend stabilization fund were returned to the eligible policyholders by American Mutual in 1980 and 1981 (A-5 and A-6)—approximately one year before this litigation was commenced.

The Court of Appeals affirmed so much of the jury verdict that awarded MTPA interest on the money retained from 1978 to 1980—a total of $92,544. *But see* Ross, C. J., dissenting, on the ground that the Magistrate was correct and, as a matter of law, there was no contract between MTPA and American Mutual. (A-13 and A-14) It reversed the jury's award of $145,292 in additional compensatory

* After trial, five members of the MTPA moved to intervene and to have this matter proceed as a class action. Over American Mutual's opposition, the District Court granted that motion (A-272-73) and this action has proceeded as a class action.

damages and $1 million punitive damages, finding that MTPA had failed to submit the requisite fact issues to the jury to support those awards, and in any event, as a matter of law, the awards could not stand. (A-9 to A-13)

Reasons for Denying the Writ

MTPA is asking this Court to conduct a detailed review of the extensive summary judgment and trial record. It hopes to convince this Court that the Court of Appeals was wrong when it determined that the full damage award in this case cannot stand because MTPA failed to submit all the necessary fact issues to the jury and that, as a matter of law, (i) there was no fiduciary relationship between MTPA and American Mutual, and (ii) the acts found by the jury to have constituted a breach of contract were insufficient to support the jury's award of $1,000,000 in punitive damages. To justify such an extraordinary and burdensome undertaking by this Court, petitioner has claimed that the decision below violated its Seventh Amendment right to trial by jury and misapplied Rule 49(a) of the Federal Rules of Civil Procedure. These claims are demonstrably without merit and do not warrant review by this Court.

With respect to the Seventh Amendment claim, MTPA, in effect, seeks to deny courts the power to grant summary judgment or judgment n.o.v. to a defendant whenever the plaintiff has demanded a jury trial. It is clear, however, that the Seventh Amendment does not circumscribe the power of a court, including an appellate court, to set aside and reverse a judgment based on a jury verdict where the evidence is insufficient to justify submission of the

issue to the jury. *See, Baltimore & Carolina Line* v. *Redman,* 295 U.S. 654 (1935); *Gregg* v. *U.S. Industries, Inc.,* 715 F.2d 1522, 1530, *clarified in part on rehearing,* 721 F.2d 345 (11th Cir. 1983), *cert. den.,* 104 S Ct. 2173 (1984); *Ballwanz* v. *Isthmian Lines, Inc.,* 319 F.2d 457 (4th Cir. 1963), *cert. den.,* 376 U.S. 970 (1964).

Likewise, in making its Rule 49(a) claim, MTPA ignores the fact that the District Court, with MTPA's full support, refused to submit the requisite fact issues to the jury as specifically requested by American Mutual in its proposed special verdict form. (A-218 to A-220, T-493-505) Thus, the Court of Appeals did not misapply Rule 49(a); rather, as found by the court below, MTPA failed to comply with the Rule's requirements that all necessary issues be submitted to the jury or they are waived.

Stripped of the constitutional rhetoric, petitioner's claim is simply that this case was wrongly decided by the Court of Appeals.* Such a claim does not justify invoking this Court's certiorari jurisdiction which is limited to

> . . . cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those

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* If the Court of Appeals did err it was in petitioner's favor since, as demonstrated by the record facts and as found by the Magistrate and in the dissent below, there was no binding contract between MTPA and American Mutual, and this case should have been dismissed in its entirety.

who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. *Magnum Import Co.* v. *Coty,* 262 U.S. 159, 163 (1923).

I. Contrary to petitioner's request, it is not the function of this Court to search the record for evidence of a fiduciary relationship between MTPA and American Mutual.

Petitioner purports to be "keenly aware that this Court is loathe to grant certiorari to review evidence and specific facts." (Pet., p. 9) But, a detailed review of the record is exactly what petitioner wants this Court to undertake. It contends that the Court of Appeals "overlooked two incredibly important facts" (*id.,* p. 11) and had not "carefully reviewed the record" (*id.,* p. 12), in reaching its conclusion that, as a matter of law, there was no fiduciary relationship between MTPA and American Mutual. Petitioner thus is asking this Court to reassess each piece of evidence in light of the applicable Minnesota law to determine whether a fiduciary relationship existed between the parties. That is plainly not a function this Court should be asked to perform. *See Southern Power Co.* v. *North Carolina Pub. Serv. Co.,* 263 U.S. 508 (1924); *Houston Oil Co.* v. *Goodrich,* 245 U.S. 440 (1918). Such a determination would necessarily be based on the specific facts unique to this case and could not possibly have implication beyond this action.

Moreover, petitioner would have this Court believe that the Court of Appeals' ruling on this issue was made "without explaining the basis of its decision" (Pet., p. 10), and

"without any explanation or support in the record." (*Id.*, p. 12) In fact, the opinion below contains a full discussion of the applicable state law (A-11 and A-12), in light of which the court reviewed the record evidence, and provided a detailed analysis for its conclusion.

> In its essence, this is a contract action. The parties dealt with each other on an arm's length basis and there is no evidence that any type of fiduciary relationship was intended or in fact that any type of confidential relationship existed between American Mutual and the Association. Further, the Association made no showing that American Mutual enjoyed superior or excessive influence over the Association. Rather, the only evidence pointed to by the Association is a statement by an officer of the Association that they "trusted" American Mutual. We conclude as a matter of law that no fiduciary relationship existed between the parties. (A-12)

In light of the fact-bound nature of this issue, and the full and cogent explanation given by the Court of Appeals for the conclusion it reached, intervention by this Court is clearly unwarranted.

II. Given MTPA's failure to submit to the jury the issues of the alleged termination of the safety group and distribution of the contingent balance, its request for intervention by this Court is inappropriate.

Petitioner also attacks the Court of Appeals' reversal of the $145,292 portion of the compensatory damage award which approximated the amount in the contingent balance at the time MTPA allegedly terminated the safety group. (See T-402-08; DX-37, B-869) In doing so, petitioner has ignored the Court of Appeals' actual holding and has asserted incorrectly that the court's holding on this issue was that "the Association had no right to terminate the group plan because the contract is silent as to termination." (Pet., p. 14) In fact, the court held that the issue of termination "was not submitted to the jury" and, therefore, it could not provide a basis for recovery of the additional $145,292 in the contingent balance. (A-9)

Despite MTPA's assertion in its petition that the termination issue was "litigated" (Pet., p. 14, subheading c.), the record is clear that with MTPA's full concurrence the District Court did not submit the termination issue to the jury. (T-493 to T-505) Indeed, MTPA objected to the questions in American Mutual's proposed special verdict form which would have secured a jury determination on this issue, and the District Court sustained that objection. (T-495)* Thus, as found by the Court of Appeals,

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* Questions 4 and 6 of American Mutual's proposed special verdict form, which were rejected by the District Court and MTPA (T-495), inquired:

(Footnote continued on following page)

MTPA has waived its right to a jury trial on this issue. Rule 49(a), Fed. R. Civ. Pro.

In addition to this waiver by MTPA—which is a complete answer to MTPA's present claim of error—the Court of Appeals also observed that "even if this issue had been submitted to the jury, we do not believe the jury could reasonably have found that the Association's withdrawal terminated the safety group." (A-9) The court noted that the specifics regarding termination of the safety group were neither discussed by MTPA and American Mutual nor included in American Mutual's proposals. (A-9 and A-10) Further, as noted earlier in the court's opinion, the safety group participants included many non-MTPA members. (A-5) Given these facts, the court correctly concluded that MTPA "had no contractual right or authority to terminate the group" and "withdrawal of its endorsement simply ended its contractual relationship with

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(Footnote continued from preceding page)

Question 4:

> . . . Did the letter of March 20, 1981 from Minnesota Timber Producers Association, Inc. to American Mutual terminate the contract [based on American Mutual's July 1972 proposal] you found in #2 above?

* * *

Question 6:

> . . . Considering all of the contractual relationships you have found to exist, do the provisions of these contracts provide for the distribution of the Contingent Balance Fund as of March 20, 1981 to the Minnesota Timber Producers Association? (RA-29)

The entire special verdict form proposed by American Mutual is reproduced as Appendix C hereto. (RA-26 to RA-31)

American Mutual and absolved both parties of any further performance under the terms of the agreement." (A-10) The lower court's conclusion on this narrow issue hardly warrants further review by this Court, particularly since the Court of Appeals' "error" arises directly from MTPA's objection to submitting the necessary fact issues to the jury.*

Petitioner also has asked this Court to declare that the monies in the contingent balance were not available to cover unexpected losses. (Pet., pp. 13-14) After reviewing the extensive record, the Court of Appeals reached the contrary conclusion. (A-4) A fair reading of the record evidence, including the summary of American Mutual's proposal (App. D to Pet., A-17 and A-18) upon which MTPA has relied so heavily throughout these proceedings, fully supports the lower court's conclusion: The insurance charge for the logger safety group is linked to the contingent balance for that group, and together, they provide American Mutual with a source of funds to help pay losses of safety group participants if the annual premiums of the group are insufficient to cover those losses. (*Id.*) In this case, by 1984 the actual losses paid by American Mutual for this safety group already had exceeded by $40,000 the amounts in the contingent balance at the time MTPA withdrew its endorsement. (See T-402-08; DX-37, B-869)

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* MTPA has incorrectly suggested in its petition that by upholding the interest portion of the damage award ($92,544) the Court of Appeals has awarded MTPA "interest on money it does not own." (Pet., p. 14 n.4) As MTPA has conceded throughout these proceedings (*e.g.*, A-84)—and the Court of Appeals was well aware of this fact—any damages awarded in this action are to be distributed to eligible participants in the Minnesota logger safety group.

In short, these facts cannot justify asking this Court to intervene in this matter and search the extensive record for a reason to overturn the lower court's carefully drawn conclusion.

III. As determined by the Court of Appeals the fraud issue was not properly submitted to the jury.

The Court of Appeals correctly noted that "A separate fraud count based on asserted misrepresentations of one of American Mutual's employees was not submitted to the jury." (A-6) MTPA challenges this conclusion by arguing that the alleged fraudulent misrepresentations of Mr. Joe Penn concerning the amount of withheld funds "constitute the activities or 'actions' upon which the fraud count is based." (Pet., p. 16)

In mounting this attack, MTPA again fails to acknowledge that it objected to the special verdict form proposed by American Mutual which would have placed this issue before the jury. Question 9 contained in American Mutual's special verdict form would have asked the jury to determine if establishment of the dividend stabilization fund was "a fraudulent misrepresentation with respect to the amounts of safety group dividend plan money being held by American Mutual?" (RA-30) Because of MTPA's objection to American Mutual's proposed special verdict form (T-493-96), the issue of Mr. Penn's alleged misrepresentation relating to the amount of funds held by American Mutual was not submitted to the jury.

Given these facts, MTPA's related argument that American Mutual consented to MTPA's formulation of the fraud issue (Pet., p. 19) is wholly without merit. As noted above, American Mutual's proposed special verdict form formulated the fraud issue in a materially different way from MTPA's formulation. Moreover, the District Court, again with MTPA's concurrence, rejected American Mutual's requested charge on the elements of fraud. (T-598-99) American Mutual's unsuccessful attempt to have this issue clearly and precisely framed for the jury can hardly be characterized as acquiescence. *See Huddleston* v. *Herman & MacLean,* 640 F.2d 534, 550 (5th Cir. 1981), *aff'd in part and rev'd in part on other grounds,* 459 U.S. 375 (1983); *Ford Motor Co.* v. *Dallas Power & Light Co.,* 499 F.2d 400, 407 & n.4 (5th Cir. 1974).

The Court of Appeals thus understandably concluded that it only had to determine "whether the same actions constituting breach [of contract] also constitute the independent tort of fraud." (A-12) Indeed, MTPA's special verdict form does not ask the jury to identify any conduct apart from the creation of the dividend stabilization fund—the alleged breach of contract— which would serve as the predicate to a finding of fraud. The Court of Appeals reviewed the record and concluded that "the breach of contract did not constitute fraud." (A-12) The court's resolution of this issue is clearly correct.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS R. NEWMAN
Attorney for Respondent, American Mutual Insurance Company of Boston

LOUIS G. CORSI
SIFF & NEWMAN, P.C.
Of Counsel

ROBERT H. MAGIE, III
BRYAN N. ANDERSON
DONOVAN, MCCARTHY, CRASSWELLER & MAGIE
Of Counsel

APPENDIX

APPENDIX A

Memorandum Decision and Recommendation of the United States Magistrate, District of Minnesota, Fifth Division

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Civ. No. 5-83-21

MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,

Plaintiff,

vs.

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

Defendant.

At Duluth, in said District, this 20th day of September, 1983.

The above-titled case came on for hearing before the undersigned United States Magistrate, pursuant to special assignment in accordance with provisions of Title 28 U.S.C. §636(b)(1)(B), upon motion by defendant for

an order dismissing this action pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, upon grounds that plaintiff is not a real party in interest. See Rule 17(a), F.R.C.P., or, in the alternative, for an order granting summary judgment pursuant to Rule 56, F.R.C.P. Plaintiff appears by Daniel H. Mundt, Esq., and defendant appears by Robert H. Magie, III, Esq.

Numerious documents extraneous to the pleadings have been submitted, considered, and their import argued by both parties. The court, therefore, considers part of the Rule 12(b) motion as converted to a Rule 56 motion.

Upon the file, record, and proceedings, the following Memorandum Decision, incorporating Findings of Fact and Conclusions of Law, is made and entered, and is deemed to comply with form requirements of the Federal Rules of Civil Procedure and Local Rules.

I.

Defendant is a mutual casualty insurance company incorporated in the State of Massachusetts.

In about 1963, defendant established a Safety Group Dividend Plan for insuring risks engaged in a common business, providing similar services, or manufacturing similar products; and adopted company rules of eligibility for inclusion within such plans, and for their administration.

The Minnesota Timber Producers Association, Inc. (MTPA), is a non-profit corporation organized and existing

under the laws of the State of Minnesota, functioning as a voluntary trade association. The precise purpose of this organization is undisclosed but we can assume that, in general, it is devoted to advancing the interests of timber producers. This action arises from an insurance plan called the Minnesota Timber Producers Workman's Compensation Safety Group Dividend Plan under which defendant has provided worker's compensation insurance to employers in the timber industry.

The initial contact between these parties in this regard occurred in about 1969, and arose from the desire of MTPA to obtain more advantageous rates for worker's compensation coverage for its members. In July, 1972, a Proposal of Insurance Protection for the Timber Producers Association was submitted by defendant. The proposal provided that participation in the plan would be limited to members of the MTPA, who would be individually solicited by defendant to purchase worker's compensation from defendant. Each purchaser would receive an individual policy tailored to its needs. MTPA's participation was limited to its endorsement and recommendation of the plan to its members. The portion of the proposed plan pertinent for our purposes has been denominated the Safety Group Dividend Plan. This plan provided that 24% of the basic premium would be retained and dedicated to this plan by defendant. From this fund, defendant would deduct losses plus a fixed percentage of the fund, which percentage declined as the fund increased, to cover catastrophic losses. Next, a portion of the fund was to be devoted to what is called a contingent balance which was designed to "smooth out" or establish dividend

returns. The amount of the contingent balance was established on a sliding scale percentage of annual premiums. Finally, any surplus of the 24% of basic premiums was to be devoted to payment of dividends to policyholders.

The proposal submitted to MTPA provides that the Contingent Balance Fund belongs to the "Association", not to the insurance company, but contains no provision governing distribution of this fund in the event that the plan is terminated, other than an implication that it would be utilized to pay a final dividend. Defendant's rules for establishing Safety Group Dividend Plans is a little more illuminating. They provide that:

> "In the event of termination of the group, the Contingent Balance, adjusted as herein provided and subject to the determination of the Board of Directors and applicable provisions of law, will be distributed to each member of the group participating at the time of termination or who had participated for at least one year within the two-year period preceding the termination, in proportion to premiums paid by such member in the group during the two-year period preceding the termination, as follows:

Time of Distribution	*Amount of Distribution (% of Contingent Balance) as of Time of Distribution*
18 Months after the termination	40%
30 Months after the termination	30%
42 Months after the termination	Remainder"

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There is no provision anywhere governing who can terminate the plan, how it is to be terminated, what act or acts constitute termination, when a termination is effective, or any of the many other considerations which would be involved in a termination.

The proposal was accepted by MTPA, and the overall plan, including the Safety Group Dividend Plan, was endorsed by MTPA in December, 1972.

The individual policies issued by defendant, as a result of direct solicitation of persons involved in the timber industry, provide that the insured becomes a member of the company with right to participate in dividends to the extent and upon conditions fixed and determinated by the Board of Directors.

In 1974, the agreement between the parties was amended to permit non-members of the MTPA to participate. At no time were all members of the MTPA participants in the plan, and, after 1974, many non-members were participants.

In March, 1981, the MTPA withdrew its endorsement of the American Mutual Worker's Compensation Safety Group Plan. Some of the policyholders have dropped their American Mutual policy. Others have not, and continue to be insured by American Mutual under the plan.

II.

The Complaint is set forth in three Counts. The first seeks a declaratory judgment that the Minnesota Timber

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Producers Workman's Compensation Safety Group Dividend Plan is terminated, and that distribution of the Contingent Balance Fund be made by defendant to those entitled to it in accordance with the agreement between plaintiff and defendant. Plaintiff makes no direct claim to the fund in this count, and, by inference, one can perceive an inkling of a claim that others were third-party beneficiaries of an agreement, and that it is these rights plaintiff now seeks to have determined. Palintiff's failure to allege a breach of contract lends credence to this inference.

The second count alleges a breach of a warranty made by defendant to plaintiff that the Contingent Balance Fund belonged to the MTPA, and seeks compensatory damages. The court finds this count novel and ingenious, if it is not simply bizarre. The court cannot fathom why the count does not sound in simple breach of contract. Of some importance, however, is what appears to be a claim to the Contingent Balance Fund by plaintiff.

The third count alleges that defendant fraudulently induced plaintiff to endorse the Plan by representing that the Contingent Balance Fund belonged to plaintiff, and that plaintiff is entitled to rescind the agreement, terminate the group, and have the Contingent Balance Fund distributed to those entitled to it. Plaintiff does not seek compensatory damages in this count, but incorporates allegations in Counts I and II to support a claim for punitive damages.

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III.

The defendant's first contention is that the Minnesota Timber Producers Association is not a real party in interest with status to prosecute this action. *See, Rule 17 (a), Federal Rules of Civil Procedure.*

The Declaratory Judgment Act, Title 28 U.S.C. §2201, provides, in pertinent part, that:

> "In a case of actual controversy within its jurisdiction, . . . any court of the United States, . . . may declare the rights and other legal relations of any interested party seeking such declaration. . . ."

The statute contemplates that a court act only in a case of actual controversy brought by an interested party. There must be a definite and concrete dispute touching upon the legal relations of parties claiming adverse legal rights. *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270 (1941); *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227 (1937).

The statute brings into play the case and controversy provision of the Constitution and the substantive doctrine of standing, as well as the procedural rule embodying the real party in interest concept. Plaintiff's argument demonstrates confusion between the doctrine and the concept. This Court will, therefore, first address the question of whether or not this plaintiff has standing to bring this action.

Standing to pursue an action in federal court is simply a shorthand means of stating that a federal court will not

entertain an action unless the plaintiff establishes that he has a right to have the issue raised and decided on its merits by a federal court. This sounds simple, but, in fact, the doctrine of standing is "an area of incredible complexity." *Scanwell Laboratories* v. *Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). Its derivation is in the rather cryptic "case or controversy" clause of the United States Constitution. See, U.S. Const. Art. III, §2, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). It involves constitutional, prudential, and collateral jurisdiction limitations. *Barrows* v. *Jackson*, 346 U.S. 249 (1953). Article III judicial power exists only to redress or protect against injury to the complaining party. This is the gist of the case or controversy clause. A plaintiff must, therefore, allege injury, causation, and a putatively unlawful act by defendant to invoke the court's jurisdiction. *Warth* v. *Seldin*, 422 U.S. 490 (1974); *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973); *Flast* v. *Cohen*, 392 U.S. 83 (1968). This is the constitutional limitation. The collateral limitation is provided by Rule 82, F.R.C.P., which provides that the Rules cannot be interpreted to extend the jurisdiction of the United States District Court. Finally, the courts have imposed prudential limitations on the standing doctrine.

To establish standing, a plaintiff must establish that the grievance is an individual grievance, not one shared generally in a substanially equal measure by all or a large class of the citizenry, *Warth* v. *Seldin, supra; Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974); *Ex parte Levitt*, 302 U.S. 633 (1937), and that the right asserted is plaintiff's legal right and not the

legal right or interest of a third party. *Warth* v. *Seldin*, *supra*; *Tileston* v. *Ullman*, 318 U.S. 44 (1943).

These general precepts, however, as most, are subject to court engrafted exceptions. One of these is the doctrine of associational standing which permits an association, which has itself suffered no justificable wrong, to appear before the court to seek judicial relief for its members, who have suffered injury sufficient to impress individual standing on them, as the representative of those injured individuals. *Cf., e.g., Sierra Club* v. *Morton*, 405 U.S. 727 (1972); *National Motor Freight Traffic Ass'n., Inc.* v. *United States*, 372 U.S. 246 (1963). The courts have determined that such plaintiff is not advocating the rights of a third party for personal redress, but possesses a derivative right to seek redress for its individual members by virtue of a special relationship which exists between the association and its members. The special relationship necessary to support associational standing arises when:

> a) Individuals who are members of the association have standing to pursue the cause of action as a personal right.
>
> b) There exists a substantial nexus between the plaintiff organization and the members to the extent that the members control the organization.
>
> c) The interest which the organization seeks to protect is germane to the purpose of the organization, and

d) Neither the claim asserted nor the relief requested requires the individual participation of members in the lawsuit.

See, Hunt v. Washington State Apple Advertising Comm'n., 432 U.S. 333 (1977); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth* v. *Seldin, supra; N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958); *Committee for Auto Responsibility* v. *Solomon*, 603 F.2d 992 (D.C. Cir. 1979), *cert. den.* 445 U.S. 915 (1980); *Health Research Group* v. *Kennedy*, 82 F.R.D. 21 (D.C. 1979).

A review of authority reveals two major fact situations in which associational standing is generally recognized. The first arises in cases in which an association invokes the judicial-review provision of the Administrative Procedure Act, Title 5 U.S.C. §701 *et seq.*, to attack government action which affects the public purpose for which the association exists. *See, e.g., Sierra Club v. Morton, supra; N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963); *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F.2d 97 (2d Cir. 1970), *cert den.* 400 U.S. 949 (1970). This line of authority has no relevance to the case sub judice.

The second line of authority involves standing of labor unions, and, to a lesser degree, trade associations, to pursue actions for the general benefit of its members. Plaintiff relies on these cases in its argument. The facts of this case, however, lack preciseness to fit into an analogy. The standing of an association to seek relief is predicated upon the proposition that the association's actions are associated actions for benefit of those associated. Standing of

the association to pursue an action depends to a large measure upon the nature and extent of the relief sought. We must, therefore, look to each count of the Complaint to determine standing in this plaintiff to pursue the cause presented by that count. *Cf., United Steelworkers, Etc.* v. *University of Ala.,* 599 F.2d 56 (5th Cir. 1979).

The first count seeks both a declaratory judgment that the Dividend Plan is terminated, and a distribution of the funds in the Contingent Balance Fund. Such judgment would affect individual rights of all policyholders—member and non-member alike—who had participated in the plan within the two year period preceding the termination, and, to a greater degree, current participants. Plaintiff seeks, in effect, to terminate the insurance contracts of current policyholders with defendant. There has been no showing that the current policyholders desire this result, or that it will work to their benefit. Secondly, although participation in the liquidation of the Contingent Balance Fund is in the nature of a refund of premiums paid, it is akin to damages. Not all members of the association will participate in the distribution, and policyholders who do participate will do so in unequal degree on an individual basis dependent upon the extent of their individual participation in the plan. Plaintiff seeks, therefore, to advance individual rights rather than general associational rights. Plaintiff does not possess standing to assert the personal and individual rights of policyholders which require individual proof.

Secondly, the doctrine of standing was developed as both a constitutional limitation on the powers of the court, and as a discretionary prudential doctrine to manage the

business of the court. It is no more than one aspect of justiciability. *See, Flast v. Cohen,* 392 U.S. 83 (1968). ated with all of the complexities and vagaries which arise from the complicated blend of constitutional requirements and policy considerations which compose the concept of justiciability. *See, Flast v. Cohen,* 392 U.S. 83 (1968). This renders generalization impossible and worthless, and elevates prudential considerations to a paramount position. *Cf., Frothingham v. Mellon,* 262 U.S. 447 (1923); *Middlewest Motor Freight Bureau* v. *United States,* 525 F.2d 681 (8th Cir. 1975). Policy considerations, in this case, dictate that the diverse and divergent interests of individual policyholders be advanced and represented by those policyholders, and not by this association, which does not represent all policyholders and whose position may not reflect the best interests of each policyholder. Even if one were to conclude that the elasticity of the Constitution imbues this plaintiff with technical standing, it appears prudent to deny plaintift standing under these circumstances.

The second and third counts are premised upon alleged contractual or tort related rights of the MTPA as such. As tenuous as these claims may be, plaintiff cannot be denied standing to assert its own rights in this Court.

IV.

Standing aside, we can turn to the precise issue raised by this motion, for even one with substantive standing is bound by procedural rules.

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Rule17(a) contemplates that an action must be brought by a party who possesses the substantive right being asserted in the lawsuit. *Iowa Pub. Serv. Co.* v. *Medicine Bow Coal Co.*, 556 F.2d 400 (8th Cir. 1977); *Mason-Rust* v. *Laborers' International Union, Local 42*, 435 F.2d 939 (8th Cir. 1970); *Vesnon J. Rockler & Co.* v. *Graphic Enterprises, Inc.*, 52 F.R.D. 335, 339 n. 5 (Minn. 1971); *Koepp* v. *Northwest Freight Lines*, 10 F.R.D. 524 (Minn. 1950). The enumeration in the Rule of persons who can be real parties in interest acting in representative capacities is illustrative, not exclusive. *Adv. Comm. Note to 1966 Amendment*, 39 F.R.D. 84, 85. The court can disregard labels, and view as a real party in interest anyone possessing a sufficiently substantial legal interest in the action to enable him to be heard on the merits. In order to apply the procedural rule, therefore, it is necessary to establish the derivation of the substantive right at issue. In a case, such as this, in which the jurisdiction of the federal court is invoked on the basis of diversity of citizenship, the federal courts merely provide a remedy for traditional state actions. State law provides the substantive right. *Iowa Pub. Ser. Co.* v. *Medicine Bow Coal Co., supra; Dubuque Stone Products Co. v. Fred L. Gray Co.*, 356 F.2d 718 (8th Cir. 1966); *Dougherty* v. *Oberg*, 297 F. Supp. 635 (Minn. 1969); *DeWitt* v. *Quarterback Sports Federation, Inc.*, 45 F.R.D. 252 (Minn. 1968).

Again, because the Complaint is set forth in separate counts embodying diverse claims of substantive rights, each count must be afforded individual consideration to determine whether or not plaintiff has capacity to assert that right.

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The first count of the Complaint seeks to establish rights under an agreement. It is hornbook law that, except for third-party beneficiaries, only one who is a party to a contract can sue to enforce its terms, or recover damages for its breach. *See e.g., Harriet State Bank v. Samels,* 164 Minn. 265, 204 N.W. 938 (1925); *Ingelson* v. *Olson,* 199 Minn. 422, 272 N.W. 270 (1937). We must, therefore, commence by identifying the contract upon which plaintiff relies, and ascertaining its terms and conditions as they relate to plaintiff's claim. Plaintiff contends that the proposal made by defendant was an offer which became a binding contract when accepted by plaintiff. The court accepts this proposition. Plaintiff then outlines what it considers to be the terms of that contract which impose rights and obligations on the parties. These contain deviations from the provisions of the proposal, but, where pertinent, will be set out verbatim with the court's comments or correction appended parenthetically.

> "A. MTPA would endorse the plan and recommend it to individual members for purchase."

(The plan would be endorsed, but the recommendation would be to purchase an insurance policy.)

> "I. The dividend plan which was available only to safety group members provided by agreement that:
>
> 5. The 'contingent balance' was a stabilizing fund, to establish and smooth out dividend returns, not to protect American Mutual from catastrophic losses. The 'insurance charge' served that purpose. The 'contingent balance'

dollars belong to the MTPA, not the insurance company. The 'contingent balance' was to be built up until it reached 20% of annual premium on the first $100,000, 15% on the next $400,000, and 10% on amounts over $500,000."

(The proposal refers to the "Association", not MTPA, and safety group members were policyholders by definition).

"6. The balance then remaining after deducting the above items was to be paid to the members as dividends in proportion to the premium paid by each."

In addition, the proposal contained the following provisions regarding dividends:

"III. DIVIDEND DECLARATION

A. Determined by MPI's directors using dividend guideline rules.

B. Paid approximately eight months following the end of each annual period.

. . .

V. DIVIDEND DISTRIBUTION

1. Dividends are declared to policyholders at a uniform rate in proportion to each policyholder's share of the total group premium regardless of individual experience.

2. Distribution.

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A. Normally directed to policyholders.

B. May request policyholders to execute an assignment of dividends to sponsoring association."

There is an obvious ambiguity and conflict in and between the provisions stating that the contingent fund belonged to the Association, as such, and the provisions stating that it would be utilized to pay dividends to policyholders, unless assignment of dividends to the association was executed. The only reasonable manner in which the provisions can be reconciled is to read association and MTPA as meaning members of the association who became policyholders. Even this interpretation must be amended, however, in the light of later events. When non-members of the MTPA were permitted to participate in this plan, any semblance of reason to consider the Contingent Fund as property of the MTPA disappears.

The terms of a contract may be modified by a subsequent course of dealing between the parties, *Trovatten* v. *Minea*, 213 Minn. 544, 7 N.W.2d 390 (1942); *Wormsbecker* v. *Donovan Constr. Co.*, 247 Minn. 32, 76 N.W.2d 643 (1956), and where a contract contemplates execution of other instruments as part of the performance of the contract, the subsequent instruments are binding insofar as elements of the contract are embodied therein. *Bradley* v. *Paul*, 153 Minn. 441, 190 N.W. 797 (1922). The proposal clearly contemplates defendant writing and issuing an individual insurance policy to each participant. This was done, and each policy provided that:

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> "The insured is a member of the company and shall participate, to the extent and upon the conditions fixed and determined by the Board of Directors in accordance with the provisions of law, in the distribution of dividends so fixed and determined."

This effectively amended and modified any conflicting provision in the proposal, or, if you will, created a new and independent contract with each policyholder superceding the contract between plaintiff and defendant.

The substantive right which plaintiff seeks to have established is the right to a final dividend upon termination of the plan. This right was not created by contract between plaintiff and defendant. This right enures solely to the policyholders by virtue of a contract of insurance between policyholder and defendant to which plaintiff was not a party. It is a right which can be vindicated only by an action by the policyholders under precepts of the law of contracts.

Plaintiff possess no substantive right to force termination of the plan, determine its terms and provisions, or participate in distribution of dividends. It is not a real party in interest in regard to Count I.

The mysterious aspects of plaintiff's second count were not addressed by counsel, and the enigma posed is unsolvable by this Court. A warranty is an allegation of an existence of fact—expressed or implied. It almost invariably flows from a purchase-sale contract to the immediate or ultimate purchaser. It differs from a representation in that it is given contemporaneously with, and as part of, a contract; whereas a representation precedes, and serves

to induce, the formation of a contract. The sentence upon which the plaintiff premises this claim appears in the section of the proposal concerning the Contingent Balance Fund which reads:

> "Dollars belong to Association, not to Insurance Company."

There was no fund at this time, and we cannot consider this a statement of present fact. It can only be a representation of what would be in the future, after policies had been sold, premiums paid, and a fund established. This is not a warranty and cannot support a breach of warranty action. At best, what plaintiff has here is an action based upon misrepresentation or breach of contract. As presently framed, Count II does not state a claim upon which relief can be granted, as a matter of substantive law.

Count III sounds in fraud in the inducement of the contract. Plaintiff correctly alleges that such fraud entitles it to rescind the contract. The agreement between plaintiff and defendant was no more than that defendant would offer an insurance program, including the dividend plan, to timber producers, and that plaintiff would endorse that plan. Insurance contracts were with individual policyholders. Plaintiff has effectively rescinded and unmade the contract which it had with defendant by retracting its endorsement. The effect of this rescision is to extinguish the contract so effectively that in contemplation of law, it never existed. *Koch* v. *Han-Shire Investments, Inc.*, 273 Minn. 155, 140 N.W.2d 55 (1966). Plaintiff has elected its remedy. A contract which never existed cannot support

an action for compensatory damages for fraud in inducement of the non-existent contract, and certainly cannot support an action for compensatory damages for fraud in inducement of the non-existent contract, and certainly cannot support an action for exemplary damages which cannot be recovered in the absence of a compensatory damage award. *See, Meixner* v. *Bueckler,* 138 Minn. 586, 13 N.W.2d 754 (1944); *Burmaster* v. *Alwin,* 138 Minn. 383, 165 N.W. 135 (1917). Count III does not state a claim upon which relief can be granted, as a matter of substantive law.

Conclusion

a.

The evidence presented establishes that the contract established by plaintiff's acceptance of the proposal made by defendant, as amended by the contemplated issuance of insurance policies by defendant to those desiring them and the subsequent course of dealing between the parties, imposed upon plaintiff one obligation, that of endorsing the plan and recommending it to its members. It imposed upon defendant the obligation to enroll purchasers of insurance policies in the dividend plan in accordance with terms of those policies and rules of the insurance company. There is no agreement regarding termination of the plan by participants. The termination of the plan, dividend payment, and distribution of the Contingent Balance Fund is governed soley by rules of the insurance company. A policyholder can terminate its participation in the plan by dropping coverage, but this does not effect

a termination of the plan for other policyholders. The funds in the Contingent Balance Fund at termination of the plan belong to eligible policyholders and not to plaintiff.

Plaintiff is not a real party in interest empowered to maintain an action to terminate the plan, to determine that the plan has been terminated by its unilateral action, or to force distribution of a dividend from the Contingent Balance Fund to whomever might be entitled to such dividend. However, rather than rest a decision on procedural grounds, and afford reasonable time for ratification of this action by all policyholders, past and present, or joinder or substitution of such policyholders, prudence dictates that, at this early stage, plaintiff be found to be without standing to pursue this action. The number of policyholders whose rights would be affected by termination of this plan, and who would be eligible to participate in a termination dividend, does not appear to be unwieldy if all are joined in one action, or included in a class for a class action suit. Any inconvenience is outweighed by an assurance that all who are to be affected have notice, and an opportunity to protect their interests.

b.

There is no dispute as to any material fact, the court has received and considered matters extraneous to the pleadings, and the record contains all evidence available to either party. The motion is, therefore, effectively converted to one for summary judgment.

Appendix A

The orderly administration of justice mandates that this plaintiff state its claim in a cognizable manner. The summary judgment rule, *Rule 56(c), F.R.C.P.*, provides, in part, that:

> ". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ."

This rule serves a useful purpose in the scheme of judicial administration by providing a vehicle through which fictitious, vexatious, or unsubstantial fact issues can be separated from genuine substantive fact issues which are properly reserved for resolution by a trier of fact. The rule enables a litigant to present to the Court for determination in a summary fashion those cases which can be determined solely upon questions of law. The Court of Appeals, in various ways, has repeatedly recited the limited circumstances in which it deems summary judgment appropriate. *See, e.g., McMahon v. Meredith Corporation*, 595 F.2d 433 (8th Cir. 1979); *Williams* v. *Evangelical Retirement Homes*, 594 F.2d 701 (8th Cir. 1979); *Narez* v. *Wilson*, 591 F.2d 459 (8th Cir. 1979); *Starling* v. *Valmac Indus., Inc.*, 589 F.2d 382 (8th Cir. 1979); *McCamly* v. *Moss*, 587 F.2d 391 (8th Cir. 1978); *EEOC* v. *Liberty Loan Corp.*, 584 F.2d 853 (8th Cir. 1978); *Robert Johnson Grain Co.* v. *Chemical Interchange Co., supra; Goodman* v. *Pawatikar*,

supra; Windsor v. *Bethesda General Hospital*, 523 F.2d 891 (8th Cir. 1975). There are cases, however, where the facts which the plaintiff can prove are not sufficient to permit recovery under the law upon which the plaintiff relies. This case falls within that category.

The claim of plaintiff which is based upon breach of warranty is without substance.

The claim of plaintiff for punitive damages based upon fraud is barred by the doctrine of election of remedies and failure to claim supportive compensatory damages. Summary judgment is the proper procedural vehicle to dispose of these claims economically and efficiently. This is the purpose for which the rule was adopted.

WHEREFORE, It is—

RECOMMENDED:

1. That Count I of plaintiff's Complaint be dismissed.

2. That defendant be granted summary judgment on Count II of plaintiff's Complaint.

3. That defendant be granted summary judgment on Count III of plaintiff's Complaint.

PATRICK J. MCNULTY
UNITED STATES MAGISTRATE

Attention is drawn to Local Rule 14 and the attached.

Appendix A

NOTICE

Pursuant to Local Rule 14C(b) any party may object to this Memorandum Decision and Recommendation by filing with the Clerk of Court, and serving all parties, within ten (10) days a writing which specifically identifies those portions of this report to which objection is made and the basis for that objection. Failure to comply with this provision shall operate as a forfeiture of the objecting parity's right to seek review in the Court of Appeals.

Unless the parties are prepared to stipulate that the District Court is not required by 28 U.S.C. §636 to review a transcript of the hearing in order to resolve all objections made to this Memorandum Decision and Recommendation, the party making the objections shall timely order, and cause to be filed within ten (10) days, a complete transcript of the hearing.

APPENDIX B

Minutes of Proceedings of the United States District Court for the District of Minnesota, Fifth Division

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

No. Civil 5-83-21

MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,

Plaintiff,

vs.

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

Defendant.

Date 12-8-83

Judge MWL

Reporter Rafel

Counsel for Plaintiff Daniel H. Mundt

Counsel for Defendant Mark Anderson

Oral argument on plaintiff's objection to Report & Recommendation issued by Magistrate Patrick J. McNulty

on September 20, 1983. Court reversed and vacated the Recommendation. Matter set for trial—February, 1984.

(signed) CONNIE L. GRENSING
Deputy Clerk

APPENDIX C

Respondent's Proposed Special Verdict Form

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Civ. No. 5-83-21

MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,

Plaintiff,

vs.

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

Defendant.

TO: CLERK OF U.S. DISTRICT COURT:

Defendant, American Mutual Insurance Company of Boston, submits the attached Proposed Special Verdict Form as per the standing Order executed by the Court on March 8, 1984.

DATED this 12th day of April, 1984.

Respectfully submitted,

DONOVAN, MCCARTHY, CRASSWELLER & MAGIE
By: ROBERT H. MAGIE, III
Attorneys for Defendant
1000 Alworth Building
Duluth, Minnesota 55802
218/722-1411

Appendix C

SPECIAL VERDICT FORM

QUESTION 1:

Was there a contract between Plaintiff, Minnesota Timber Products Association, Inc. and Defendant, American Mutual Insurance Company of Boston, which provided that Defendant, American Mutual, would organize and implement a dividend safety group pursuant to its national plan in exchange for the sponsorship of the Minnesota Timber Producers Association, Inc?

ANSWER:_____

(Yes or No)

QUESTION 2:

Did Plaintiff, Minnesota Timber Producers Association, Inc. and Defendant, American Mutual Insurance Company of Boston enter into a contract in 1972, the terms and conditions of which were contained in American Mutual's pamphlet entitled, "A Proposal of Insurance Protection", provided to Plaintiff on July 28, 1972?

ANSWER:_____

(Yes or No)

QUESTION 3:

Did all the participants of the Safety Group Dividend Plan enter contracts directly with Defendant American Mutual Insurance Company of Boston

with the issuance of each policy of insurance from American Mutual to the individual policyholders?

ANSWER:_____
(Yes or No)

QUESTION 4:

Only if you answered "Yes" to question #2 above, answer this question: Did the letter of March 20, 1981 from Minnesota Timber Producers Association, Inc. to American Mutual terminate the contract you found in #2 above?

ANSWER:_____
(Yes or No)

QUESTION 5:

Only if you have answered "Yes" to question #3 above, answer this question: Did the letter of March 20, 1981 from Minnesota Timber Producers Association, Inc. to American Mutual terminate the individual contracts you found in #3 above.

ANSWER:_____
(Yes or No)

QUESTION 6:

Only if you have answered "Yes" to questions #2, #3, #4 and #5 above, answer this question: Considering all of the contractual relationships you have found to exist, do the provisions of these contracts provide for the distribution of the Contingent Balance Fund as of March 20, 1981 to the Minnesota Timber Producers Association?

ANSWER:_____
(Yes or No)

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QUESTION 7:

What amount of money was in the Contingent Balance Fund as of March 20, 1981?

ANSWER: $_____

QUESTION 8:

Considering all of the contractual relationships that you have found to exist, did American Mutual Insurance Company of Boston breach those contracts by establishing the Dividend Stabilization Fund?

ANSWER:_____
(Yes or No)

QUESTION 9:

Was the establishment of the Dividend Stabilization Fund a fraudulent misrepresentation with respect to the amounts of safety group dividend plan money being held by American Mutual?

ANSWER:_____
(Yes or No)

QUESTION 10:

Only if you answer "Yes" to either or both of questions #7 and #8 above, then answer this question: What amount of money represents the damage, if any, suffered by Plaintiff, Minnesota Timber Producers Association, Inc., as a result of the findings which you made in question #7 and #8?

ANSWER: $_____

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QUESTION 11:

Only if you found that Defendant's conduct directly caused damage to Plaintiff Minnesota Timber Producers Association, Inc. in question #9 above, answer this question: If you find that Defendant's conduct directly caused injury to Plaintiff Minnesota Timber Producers Association, Inc., do you find that Defendant's conduct was so willful or so malicious that justice requires you to award the Minnesota Timber Producers Association, Inc. an amount which will serve to punish Defendant and to deter others from the commission of like acts?

ANSWER:_____

(Yes or No)

QUESTION 12:

Only if you answer "Yes" to question #11 above, answer this question: What amount of money should Defendant pay as punitive damages as a result of the findings that you made in question #11 above?

ANSWER: $_____